Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 74-1623

CHESTER SLONE, ET AL. ..... APPELLANTS

VS:

DESKINS BRANCH COAL COMPANY, ET AL. ..... APPELLEES

ON APPEAL FROM THE SPECIALLY CONSTITUTED THREE JUDGE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

MOTION TO DISMISS OR AFFIRM

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 74-1623

CHESTER SLONE, ET AL. ..... APPELLANTS

VS:

DESKINS BRANCH COAL
COMPANY, ET AL. ..... APPELLEES

ON APPEAL FROM THE SPECIALLY CONSTITUTED
THREE JUDGE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY

MOTION TO DISMISS OR AFFIRM

MAY IT PLEASE THE COURT:

Appellees move the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Specially Constituted Three Judge United States District Court for the Eastern District of Kentucky on the ground that it is manifest that the issues on which the decision of the case depends do not present a substantial federal question.

STATEMENT OF THE QUESTION PRESENTED

IS THE DEFFERAL OF PAYMENT OF INCREASED STATE WORKMEN'S COMPENSATION BENEFITS TO COAL MINERS DISABLED BY PNEUMOCONIOSIS, WHO, AS A CLASS, ARE THE ONLY PERSONS ENTITLED TO FILE CLAIMS FOR ADDITIONAL OCCUPATIONAL DISEASE DISABILITY BENEFITS PROVIDED BY THE FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969, AS AMENDED, A VIOLATION OF RIGHTS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

STATEMENT OF THE CASE

This case is an appeal from the Judgment of the specially constituted Three Judge United States District Court for the Eastern District of Kentucky dismissing appellants action for declaratory and injunctive relief. The issue presented is whether there is a denial of equal protection under the fourteenth amendment to the United States Constitution to coal miners in Kentucky applying for state workmen's compensation benefits because of the occupational disease of pneumoconiosis popularly called "black lung." In 1972 the Kentucky General Assembly raised the level of compensation benefits for those persons covered by the provisions of the workmen's compensation act excepting only those persons covered by the Federal Black Lung Act who apply for benefits after January 1, 1973. The applicable statute is set out in the appendix herein, p. 2a.

In the consolidated cases of *Otis Maggard* v. *Inter-*

National Harvester Company, et al., Ky. 508 S.W.2d 777, (Feb. 1, 1974 as modified on Denial of Rehearing April 12, 1974) the Kentucky Court of Appeals rendered an opinion as to the construction and application of the 1972 amendments to the Kentucky Workmen's Compensation law. One issue in that case concerned the amount of compensation to be received by coal miners who became totally disabled subsequent to January 1, 1973 from the occupational disease of coal worker's pneumoconiosis, commonly called "black lung." The Court held that the 1972 amendments which increased workmen's compensation benefits so as to provide $81.00 per week for life to workmen's compensation claimants suffering permanent total disability was deferred as to that class of claimants suffering from pneumoconiosis stating as follows at page 785:

> "As we construe Section 37, the increased benefits payable to black-lung claimants under the Kentucky Workmen's Compensation Act, as amended by Senate Bill 184, are deferred for such a period of time as there is in existence a federal black-lung program."

The appellant herein, Chester Slone and others, allege that the interpretations of the law made by the Kentucky Court of Appeals in the Maggard case contravenes the United States Constitution and is violative of the equal protection clause of the Fourteenth Amendment because only coal miners suffering from the occupational disease of "black lung" were denied increased benefits under the 1972 amendments by the Kentucky General Assembly.

ARGUMENT

THE ISSUE RAISED IN THE INSTANT CASE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION UNDER THE EQUAL PROTECTION CLAUSE IN THE FOURTEENTH AMENDMENT.

A. THE LEGISLATURE HAS BROAD POWERS TO CLASSIFY PERSONS ELIGIBLE FOR WORKMEN'S COMPENSATION BENEFITS. THE SUB-CLASSIFICATION IN THE INSTANT CASE OF COAL MINERS ELIGIBLE FOR FEDERAL BLACK LUNG BENEFITS IS VALID.

Compensation Acts are not ordinarily applicable to all employments. Some are applicable only to certain occupations of a hazardous character. See 58 Am. Juris. Workmen's Compensation Sec. 81, page 635. Many states, as is true in Kentucky, exempt domestic servants and persons employed in agriculture. See KRS 342.650 in the appendix, p. 1a. Many states impose a requirement that there be a minimum number of persons working for a single employer before there is coverage. Therefore, it is abundantly clear that some employees, such as agricultural workers, are discrminated against because they receive no compensation benefits from work connected accidents and diseases. The United States Supreme Court in the case of *New York Central Railroad Co.* v. *White,* 243 U.S. 188, 61 L.Ed 667, 37 S.Ct. 247 (1917) as to the exclusion of farm laborers and domestic servants from the scheme of the New York statute at page 677 of 61 L. Ed. stated:

> "Manifestly, this cannot be judically declared to be an arbitrary classification, since it reasonably may be

> considered that the risks inherent in these occupations are exceptionally patent, simple, and familiar."

In *Middleton* v. *Texas Power & L. Co.,* 249 U.S. 152, 63 L.Ed. 527, 39 S.Ct. 227 (1919), the Court upheld the exclusion of gin laborers on the same reasoning as applied to farm laborers.

In *Ward & Gow* v. *Krinsky,* 259 U.S. 503, 66 L.Ed. 1033, 42 S.Ct. 529 (1922), 28 ALR 1207, the Court stated at page 1041 of 66 L.Ed. as follows:

> "——There is a strong presumption that a legislature understands and correctly appreciates the needs of its own people: that its laws are directed to problems made manifest by experience; and that its discriminations are based upon adequate grounds." Citing *Middleton* v. *Texas Power & L. Co.,* supra.

The Court in the case of *McGowan* v. *State of Maryland* 366 US 420, 81 S. Ct. 1101; 6 L. Ed. 2d 393 (1961) stated at page 399 of 6 L. Ed. 2d:

> "_____ State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequalty. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.——"

Mr. Justice Potter Stewart, speaking for the Supreme Court majority in *Dandridge* v *Williams,* 397 U.S. 471, 90 S. Ct. 153, 25 L. Ed. 2d 491 (1970) at page 501 of 25 L. Ed. 2d stated as follows:

> "In the area of economics and social welfare, a State

does not violate the Equal Protection clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis', it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 55 L. Ed. 369, 31 S. Ct. 337 'The problems of government are practical ones and may justify, if they do not require, rough accommodations — illogical, it may be and unscientific.'*Metropolis Theatre Co.* v. *City of Chicago,* 228 U.S. 61, 69-70, 57, L.Ed. 730, 734, 33 S. Ct. 441. 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' *McGowan* v. *Maryland,* 366 U.S. 420, 426, 1105, 6 L Ed. 2d 393, 399, 81 S. Ct. 1101.

In the case of *Ross* v. *Moffitt,* . . . U.S. . . . , 94 S. Ct. 2437 (June 17, 1974) at page 2444 of 94 S. Ct. the Court stated:

> "Despite the tendency of all rights 'to declare themselves absolute to their logical extreme,' there are obviously limits beyond which the equal protection analysis may not be pressed without doing violence to principles recognized in other decisions of this Court. The Fourteenth Amendment 'does not require absolute equality or precisely equal advantages,' *San Antonio Independent School District* v. *Rodriquez,* 411 U.S. 1, 24, 93 S Ct. 1278, 1291, 36 L. Ed. 2d 16 (1973), nor does it require the State to 'equalize economic conditions.' *Griffin* v. *Illinois,* supra, 351

> U.S. at 23, 76 S. Ct. at 592 (Frankfurter, J., concurring). It does require that the state appellant system be 'free of unreasonable distinctions,' *Rinaldi* v. Yaeger, 384 U.S. 305, 310, 86, S. Ct. 1497, 1500, 16 L. Ed. 2d 577 (1966) . . ."

There are several court decisions sustaining legislation which put the coal mining industry in a separate class as to State Workmen's Compensation Laws In the case of *Johnston* v. *Kennecott Copper Corp.,* (1918) 160 C.C.A. 417, 248 Fed. 407 (affirming 1916) 5 Alaska 571, the Court upheld the constitutionality, as against the objection of class legislation, of the Alaska Workmen's Compensation Law, which in terms applied only to mining concerns employing five or more persons. The Court noted that mining is the one great industry of Alaska.

In the case of *Lower Vein Coal Co.* v. *Industrial Board,* (1921) 255 U.S. 144, 65 L. Ed. 555, 41 Sup. Ct. Rep. 252 this Court sustained the Constitutionality of the Indiana Workmen's Compensation law where the law was compulsory as to the coal mining industry but elective as to other occupations.

See also, *American Coal Co.* v. *Allegany County* (1916) 128 Md. 564, 98 Atl. 143 (1916) applying only to those engaged in mining coal and clay in two counties which the court ruled to be constitutional.

In the case of *Scott* v. *Nashville Bridge Co.* 143 Tenn. 86, 223 S.W. 844 Tenn. (1920) the Court sustained the constitutionality of the Workmen's Compensation Law that exempted coal operators and their employees.

Larson at vol. 2 Sec. 65.40 notes an instance where

an occupational disease statute permits an award for silicosis only when it has reached the stage of total disability, and that an employee suffering from partially-disabling silicosis cannot sue at common law citing a New York case, *Del Busto* v. *E. I. Dupont DeNemours & Co.,* 167 Misc. 920, 5 N.Y.S. 2d 174 (1938) aff'd 259 App. Div. 1070, 21 N.Y.S. 2d 417, appeal denied, 284 N.Y. 817, 29 N.E. 2d 975. In that case the Supreme Court of Niagara County in 5 N.Y.S. 2d 174 held that the compensation act did not violate the fourteenth amendment to the Constitution of the United States nor Section 6 of Article 1 of the Constitution of the State of New York.

The questions before the Court were first, whether or not the legislature took away from the plaintiff his common law right of damages for partial disability: and second, if such right of action was taken away, was it done without providing another or different remedy, and thus in violation of the Constitution of the United States and of the State of New York.

In discussing the intent of the legislature to leave to plaintiff the right to sue at common law for partial disability the court stated at 5 N.Y.S. 2d page 176 that it was:

> "____ of the opinion that after further study of the burden of the disease upon industry, the legislature decided that the employer should bear the effect of total disability and that the employee should bear the burden arising from partial disability.

In a per curiam opinion, the Supreme Court, Appellant Division, Fourth Department 259 App. Div. 1070, 21 N.Y.S. 2d 417 affirmed the lower court, appeal denied 29 N.E. 2d 975.

Thus it is to be noted that the courts have consistently held that the mining industry and its workers can be treated as a separate class under state workmen's compensation laws and have also held that workers' suffering from silicosis can be put in a special classification for compensation purposes.

This Court should take judicial notice of the fact during the current energy crisis that Kentucky for some years has been the leading coal producing state in the nation. Because of this fact and because of the peculair working conditions of the coal industry and because the occupational disease of pneumoconiosis is developed only after many years of exposure and because of the multitude of compensation claims being filed thereunder during the years 1972 when the law in question was enacted, it is manifest that very special conditions existed which would justify a special classification by the Kentucky legislature in regard to coal miners.

See also the case of *Geduldig* v. *Aiello,* 41 L. Ed. 2d 256, 94 S. Ct. _____ (1974) for one of the most recent United States Supreme Court cases on the subject of the Equal Protection Clause. In that case the state of California had a disability insurance program for private employees temporarily disabled from working by an injury or illness not covered by workmen's compensation. It was financed by an assessment of one percent of the employee's salary. The California program insured against abnormal pregnancies but normal pregnancies were excluded. The law's constitutionality was challenged by a

woman having a normal pregnancy. This Court held that a state is not required by the Equal Protection Clause to sacrifice the self supporting nature of the program, reduce the benefits payable for covered disabilities, or increase the maximum employee contribution rate just to provide protection against another risk of disability, such as normal pregnancy The Court declared that the equal protection clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all.

It is interesting to note that California under the pregnancy classification had two sub-classes: Normal pregnancies and abnormal pregnancies. One was compensable, the other non compensable. In Kentucky, coal miners suffering from injuries have a different classification than coal miners suffering from black lung. This is not an invidious classification in view of the legislatures attempt to unify the joint state-federal program. Congress itself had first created the separate classification for coal miners suffering from black lung when it passed the Federal Coal Mine Health and Safety Act of 1969.

B. THE UNITED STATES CONGRESS HAS FOUND THAT THE PECULIAR CIRCUMSTANCE AND CONDITIONS OF COAL MINERS JUSTIFY SPECIAL TREATMENT REGARDING COMPENSATION FOR PNEUMOCONIOSIS.

The Congressional findings and declaration of purpose in reference to Black Lung Benefits are set out in Section 901 of Title 30 of U.S. Code Annotated and the

1972 amendments thereto. Their purpose was to insure that coal miners and their dependants got adequate benefits under the federal law, in cooperation with the States, for death or disabilities due to pneumoconiosis.

Section 931 of the federal act as amended in 1972, provides as follows:

> "(a) On and after January 1, 1974, any claim for benefits for death or total disability due to pneumoconiosis shall be filed pursuant to the applicable state workmen's compensation law, except that during any period when miners or their surviving widows, children, parents, brothers, or sisters, as the case may be, are not covered by a State workmen's Compensation law which provides adequate coverage for pneumoconiosis they shall be entitled to claim benefits under this part.

The provisions of sub section "b," then make provisions for the Secretary to publish in the federal register a listing of those states providing adequate coverage and sets forth certain criteria that is to be used by the Secretary as guidelines in making his determination.

Section 932 (a) as amended in 1972, provides that during any period after December 31, 1973, that the individual coal operators, in states not in compliance as to adequate coverage are subject to the provisions of Public Law 803, 69th Congress (44 Stat. 1424 approved March 4, 1927) as amended. [The Longshoresmen Act].

Section 932 (g) provides that any benefits payable to disabled miners under the provisions of the Longshoresmen Act shall be reduced by the amount of any compensation received under a State workmen's compensation law because of death or disability due to pneumoconiosis.

Section 933 requires coal operators to qualify through insurance companies or as self-insurers to meet all black lung compensation claims in states that are not in compliance with the federal requirements. Neither Kentucky nor any other state has met those requirements.

Section 902 (c) as amended in 1972, gives jurisdiction to the Secretary of Labor after January 1, 1974, in reference to administering the federal black lung program, part C.

C. GREAT WEIGHT SHOULD BE GIVEN TO THE RULING BY THE KENTUCKY COURT OF APPEALS THAT THE LAW IN QUESTION IS CONSTITUTIONAL.

The same counsel prosecuting the present appeal of the class action suit filed in the United States District Court for the Eastern District of Kentucky represented a Kentucky coal miner who claimed a violation of his rights under the fourteenth amendment to the United States Constitution in the case of *Fid Chapman* v. *Eastern Coal Corporation,* Ky., 519 S.W. 2d 390 (Feb. 7, 1975). No Petition for a Writ of Certiorari was filed in that case and the decision of the Kentucky Court of

Appeals holding the law constitutional has become final. The Kentucky Court of Appeals in that case traced the legislative and medical history of compensation to coal miners for occupational diseases and noted as follows at page 394:

> ". . . all this we point out only to illustrate that science, history and politics all have combined to put black lung in a different class from other work connected disabilities . . ."

CONCLUSION

It is clear that the Kentucky legislature could deny benefits altogether for coal miners for pneumoconiosis or black lung. If this is so it would seem that such benefits could be frozen at present levels. In the area of economic and social welfare the states have very broad powers and the constitution is not offended simply because there is some inequality of benefits. The Kentucky Court of Appeals has found that medical science, history and politics have all combined to put black lung in a different class from other work connected disabili-

ties. The law being settled on this issue, there is no substantial federal question and the judgment herein should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Cyril E. Shadowen, one of counsel for appellees, Hon. James R, Yocom, Commissioner of Labor, Commonwealth of Kentucky and Custodian of the Special Fund, Special Fund, do hereby certify that on the 17th day of July, 1975, I served copies of the foregoing Motion to Dismiss or Affirm on the parties hereto as follows:

1. On appellants Chester Slone, Abel Chapman, Jr., Phillip Anderson, Cledis Kinney by depositing three copies each of same, postage prepaid, addressed to counsel for appellants C. Kilmer Combs, P. O. Box 112, Pikeville, Kentucky 41501

2. On Deskins Branch Coal Company, Kimper Kentucky; on Kentucky-Elkhorn Coals, Inc., McDowell, Kentucky; and on Kentucky Carbon Corporation, Phelps, Kentucky by depositing three copies each of same, postage prepaid, addressed to their counsel, Hon. William J. Baird, Baird & Baird, P. O. Box 351, Pikeville, Kentucky 41501.

3. On Shelby T. Denton, Chairman, Alfred A. Naff, George B. Simpson, Clyde Mullins, and Glen Schilling, Members comprising the Workmen's Compensation Board of Kentucky, and Ed W. Hancock, Attorney General of Kentucky, by depositing in a United States Post Office three copies thereof in a duly addressed envelope with first class postage prepaid addressed to Thomas R. Emerson, Assistant Attorney

General, Capitol Building, Frankfort, Kentucky 40601, their attorney of record.

4. All parties required to be served have been served.

Cyril E. Shadowen

CYRIL E. SHADOWEN
Attorney for Appellees
Hon. James R. Yocom,
Commissioner of Labor,
Commonwealth of Kentucky
and Custodian of the Special Fund
and Special Fund

APPENDIX

APPENDIX

Applicable Kentucky revised statutes as amended in 1972.

342.650 Exemptions. The following employes are exempt from the coverage of this chapter:

(1) Any person employed as a domestic servant in a private home by an employer who has less than two employes each regularly employed 40 or more hours a week in such employment.

(2) Any person employed, for not exceeding 20 consecutive work days, to do maintenance, repair, remodelling, or similar work in or about the private home of the employer, or if the employer has no other employes subject to this chapter, in or about the premises where such employer carries on his trade, business or profession.

(3) Any person performing services in return for aid or sustenance only, received from any religious or charitable organization.

(4) Any person for whom a rule of liability for injury or death is provided by the laws of the United States, except those persons covered under Title IV, Public Law 91-173, 91st Congress, commonly referred to as the Black Lung Benefits of the Federal Coal Mine Health and Safety Act of 1969, or as amended.

(5) Any person employed in agriculture.

(6) Any person who would otherwise be cov-

ered but who elects not to be covered in accordance with the rules and regulations promulgated by the Board. (1972, c. 78, § 5).

*"NOTE: Effective date. This Act shall be effective on January 1, 1973; and effective for all claims filed on and after January 1, 1973; provided, however, that in the event federal law specifies that claims covered by provisions of this Act shall be filed with a federal agency such claims shall continue to be held as required by the federal law until repeal or expiration of the federal law requiring same; then, in that event, the increase in benefits provided herein shall not apply to those claims where benefits are awarded under the federal law. The benefits under the present law KRS Chapter 342 shall apply to those claims. (1972, c. 78, § 37; effective date clause, not compiled.)

*The applicable law to the central issue in this case deffering increased benefits was not given an official section number by the statute compiler.